Supreme Court, U.S.
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In The
Supreme Court of the United States

IN RE

GARY VICTOR DUBIN

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Notwithstanding this Court's recent opinion in *Mohawk Industries, Inc. v. Carpenter*, __ U.S. __, 130 S.Ct. 599, 609 (2009), is it an abridgment of a corporate officer's/director's Fifth and Sixth Amendment constitutional rights for a district court to invade the attorney-client privilege and order the production of confidential communications with outside counsel retained specifically to advise them whether their conduct violated federal and state securities and criminal laws?

2. Specifically, does a corporate defendant forever lose its attorney-client privilege with respect to communications with its outside attorney who advised it and its officers and directors with respect to its compliance with criminal and securities laws, when the corporation's business operations are interrupted by court order rendering it "essentially defunct," and while its officers and directors face potential criminal liability for the very matters upon which they consulted outside counsel?

LIST OF PARTIES

United States Commodity Futures Trading Commission,
Real party in interest.

WeCorp, Inc., a Hawaii corporation,
Defaulted defendant below.

Stuart W. Jones,
Defaulted defendant below.

Payton Lowe,
Defaulted defendant below.

Gary Duck,
Defaulted relief defendant below.

Nathan P. Ramos,
Defaulted relief defendant below.

COURTS BELOW

United States District Court for the District of Hawaii,
Respondent.

United States Court of Appeals for the Ninth Circuit,
Respondent.

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PETITION FOR A WRIT OF MANDAMUS

Petitioner Gary Victor Dubin, a Hawaii attorney who was previously retained as outside counsel to advise a corporation with respect to its compliance with federal and state securities and criminal laws, hereby seeks from this Court in aid of its appellate jurisdiction a writ of mandamus to the United States Court of Appeals for the Ninth Circuit and the United States District Court for the District of Hawaii, compelling those courts to vacate their respective orders requiring the production of privileged documents and communications by June 7, 2010, to the irreparable detriment of Petitioner's former corporate client's attorney-client privilege.[1]

OPINIONS AND ORDERS BELOW

The underlying orders and judgments adverse to the attorney-client privilege issued by the United States District Court for the District of Hawaii and the United States Court of Appeals for the Ninth Circuit, requiring the filing of this Petition, are set forth in the Appendix.

The complete filed record in the district court below in, Civil No. 09-CV-00153, and in the court of appeals Case No. 10-71739, is available via the United States Courts Public Access to Court Electronic Records ("PACER") system.

JURISDICTIONAL STATEMENT

Due to exceptional, irreparable circumstances and the unavailability of adequate relief in any other form or in any other court, including the

[1] Petitioner is necessarily filing simultaneously herewith a motion to stay the district court's orders pending this Court's review of this Petition.

unavailability of interlocutory appellate relief due to this Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, ___ U.S. ___, 130 S.Ct. 599, 609 (2009), this Court has the sole power to review the proceedings below and to grant this Petition pursuant to Section I of Article III of the United States Constitution, Section 1651(a) of Title 28 of the United States Code, and Supreme Court Rule 20.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, including the right against self-incrimination, which right is safeguarded by the attorney-client privilege, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(Emphasis added.)

The Sixth Amendment, including the right to counsel, which right is also safeguarded by the attorney-client privilege, provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

> nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defense.*

(Emphasis added.)

STATEMENT OF THE CASE

A. Introduction

This petition raises an issue of first impression of fundamental importance to every person's ability to pursue legal advice and speak candidly with counsel without the fear of self-incrimination and seeks to promote broader public interests in the observance of law and administration of justice.

Petitioner, a California and Hawaii attorney, was retained briefly as outside independent legal counsel to advise a corporation and its officers and directors, on a confidential basis, regarding its investment program's compliance with federal and state securities and criminal laws.

Following Petitioner's rendering of that legal advice, the Commodity Futures Trading Commission filed suit against the corporation and its officers and directors as Defendants, accusing them of conducting a Ponzi Scheme, and naming outside counsel as a Relief Defendant in the action, apparently for tactical reasons, seeking disclosure of his communications with the Defendants and a return of legal fees he was paid.

After Petitioner produced in discovery nearly 4,000 pages of his communications with the Defendants in redacted form so as to protect the attorney-client privilege, Petitioner has now been ordered to turn over in unredacted form all of his confidential privileged documents and

communications, notwithstanding the attorney-client privilege, by June 7, 2010.

The corporation and its officers and directors, meanwhile, have chosen not to defend in the action below, and face potential indictment on felony charges. The corporation's officers have instructed Petitioner not to disclose their privileged documents.

Petitioner sought an emergency writ of mandamus from the United States Court of Appeals for the Ninth Circuit on May 28, 2010. However, that emergency petition was erroneously denied five days later on June 2, 2010.

This Court's intervention is therefore urgently needed on an emergency basis to determine the professional and constitutional propriety of the lower courts' orders invading the attorney-client privilege in the circumstances described herein.

B. Factual and Procedural Background

Plaintiff/Respondent United States Commodity Futures Trading Commission ("CFTC") alleged in its complaint below that Defendant WeCorp, Inc. ("WeCorp"), a Hawaii corporation, and its principals engaged in a "Ponzi Scheme" in violation of the Commodity Exchange Act, 7 U.S.C. § 1 et seq. ("the Act"), thereby initiating Civil No. 2:09-CV-00153-PMP in the United States District Court for the District of Hawaii. In what appears to have been a strategic maneuver to ensure that WeCorp would not be represented by counsel in that action, the CFTC named Hawaii attorney Gary Victor Dubin as a "relief defendant," unfoundedly alleging that Petitioner received proceeds from the purported Ponzi Scheme in the form of legal fees from WeCorp. The CFTC claimed that Petitioner did not earn those fees. It initially asked that Petitioner's bank accounts be frozen by order of the district court, and insisted that Petitioner turn over all of his

documents and communications involving WeCorp. Petitioner's law firm had previously been retained by WeCorp at the request of its board of directors to conduct an independent legal audit of its affairs based upon a negotiated fixed cost $75,000 contract.

Following the CFTC's filing of its complaint below, WeCorp was in fact unable to secure legal counsel or defend itself in this case, and default judgments were therefore entered by the district court against WeCorp and its principals. Despite entry of those default adjudications, and even though WeCorp has never waived its attorney-client privilege, the CFTC nevertheless continued to insist that Petitioner produce all of his privileged communications and documents involving WeCorp, all the while inconsistently maintaining that Petitioner as a relief defendant is not accused of any wrongdoing or violation of the Act, but is a mere "trustee, agent, or depositary," of funds transferred from WeCorp to which Petitioner supposedly has no ownership interest.

Petitioner, on the other hand, has steadfastly maintained since the beginning of this case that his law firm provided extensive legal and consulting services for WeCorp, as he originally attested in his Declaration dated April 13, 2009 (CM/ECF Doc. #19(2)), and which he has reaffirmed continuously throughout this case. Petitioner has, although being unduly handicapped in presenting his own legal defense by his professional and ethical obligation to defend and preserve the attorney-client privilege, produced over four thousand pages of redacted discovery materials, which in and of themselves clearly demonstrate that he performed substantial services for WeCorp in return for the compensation he received. Petitioner's time sheets alone (CM/ECF Doc. #120-8), clearly illustrate that he provided extensive services for and to WeCorp.

In asserting the attorney-client privilege, Petitioner initially provided the CFTC with his first "Response (1) To Plaintiff's First Request for Production of Documents and (2) To Plaintiff's First Request for Answers to Interrogatories," including a Declaration (CM/ECF Doc. #120-3) which were served upon the CFTC on May 18, 2009.

Thereafter, Petitioner served his "Supplemental Response to Plaintiff's First Request for Production," upon the CFTC on June 8, 2009, (CM/ECF Doc. #120-6), again asserting the attorney-client privilege and objecting to the scope of the CFTC's requested document production.

Despite Petitioner's repeated assertion of the attorney-client privilege on behalf of his former client, the district court nevertheless proceeded to issue a number of *sua sponte* orders directing Petitioner to produce all of the documents requested by the CFTC, as well as a privilege log, over Petitioner's objections, even though the CFTC had not even filed a motion to compel. (CM/ECF Docs. #61, #66, #68).

The CFTC did finally file a motion to compel on August 11, 2009 (CM/ECF Doc. #71), even though Petitioner had already produced thousands of pages of the requested discovery materials and even though Petitioner continued to make diligent and substantial progress in the overwhelming task of production. At a telephone conference on August 31, 2009, even though Petitioner had never requested the district court conduct an *in camera* inspection of Petitioner's privileged documents, even though absolutely no evidence whatsoever was presented to invoke the crime-fraud exception to the attorney-client privilege, and even though WeCorp had not waived the attorney-client privilege, the district court nevertheless, again acting *sua sponte* without advance notice to Petitioner, ordered that Petitioner

provide the court with full copies of all of his redacted privileged documents as well as unredacted copies of those documents, so that the court could conduct an *in camera* inspection to determine the legitimacy of Petitioner's assertion of the attorney-client privilege. (CM/ECF Doc. #81).

On September 28, 2009, after Petitioner had sent a third shipment of documents to the CFTC and after Petitioner mailed a full set of all previously produced documents to the district court, the court nevertheless entered an order granting the CFTC's motion to compel (CM/ECF Doc. #105), thereby requiring, *inter alia*, that Petitioner produce both a privilege log and provide the court with unredacted copies of all privileged documents so that the court could conduct an in camera review.

Petitioner thereafter filed a motion for protective order (CM/ECF Doc. #110) to prevent any unjustified invasion of the attorney-client privilege or *in camera* inspection. Petitioner completed the remainder of his court-ordered document production on October 13, 2009, as certified by his counsel (CM/ECF Doc. #115), after having spent over $150,000 in this action in mandatory efforts to preserve the attorney-client privilege.

On December 23, 2009, the district court granted Petitioner's motion for protective order. (CM/ECF Doc. #140). The CFTC nevertheless filed its "Motion For an Order Compelling Relief Defendant Gary V. Dubin To Produce Unredacted Documents," on February 17, 2010 (CM/ECF Doc. #147), therein requesting that Petitioner produce unredacted copies of a number of specific documents he previously produced for WeCorp in redacted form, having withheld certain information on the basis of the attorney-client privilege. On March 5, 2010, the presiding district judge appointed a magistrate to preside over that motion. (CM/ECF Doc. #154).

After the CFTC's motion was fully briefed, despite its limited request for specific identified documents, the magistrate nevertheless went ahead and *sua sponte* expanded the scope of the CFTC's motion and ordered that Petitioner "produce all documents to [the CFTC] that he has withheld on the basis of the attorney-client privilege, including the redacted portions of such documents." (Appendix at A-5).

In doing so, the magistrate found that "[t]he evidence in this case, while not as conclusive as that in *Lopes v. Vieira*, [2010 WL 430810 (E.D.Cal. 2010),] also supports the conclusion that WeCorp, Inc. is essentially a defunct corporation." (Appendix at A-15). Therefore, the magistrate concluded, based on this Court's opinion in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986 (1985) as interpreted in a number of non-controlling and/or unpublished district court opinions from other jurisdictions, that Petitioner could not assert the attorney-client privilege previously observed by the district court on behalf of WeCorp.

On April 14, 2010, Petitioner filed, pursuant to Rule 74.1 of the Local Rules of Procedure for the district court, an appeal of the magistrate's order to the district judge. The district judge affirmed the magistrate's order. (Appendix at A-3) The district judge expressly stayed the enforcement of that order until June 7, 2010, so that Counsel herein could seek mandamus relief in the Ninth Circuit.

As explained above, Petitioner sought an emergency writ of mandamus from the United States Court of Appeals for the Ninth Circuit on May 28, 2010. However, that emergency petition was erroneously denied five days later on June 2, 2010. (Appendix A-1).

For the reasons set forth herein, Petitioner now

requests this Court review the underlying proceedings and issue a writ of mandamus vacating the lower courts' orders requiring unredacted production of confidential attorney-client communications and documents.

LEGAL ARGUMENT

This Court, in *Mohawk Industries, Inc. v. Carpenter*, __ U.S. __, 130 S.Ct. 599, __ L.Ed.2d __ (2009), recently held that "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege." *Id.* at 609.

In response to *Mohawk*, the Ninth Circuit recently held in *Hernandez v. Tanninen*, __ F.3d __, 2010 WL 1882304 (9th Cir. May 12, 2010) that, although "the collateral order doctrine does not extend to disclosure orders adverse to the attorney-client privilege . . . [this Court] may treat an appeal from an otherwise nonappealable order as a petition for writ of mandamus." *Id.* at *1-*2. In *Hernandez*, the court of appeals explained:

> "Mandamus is appropriate to review discovery orders when particularly important interests are at stake." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1156-57 (9th Cir.2010) (internal quotation marks omitted); *see also Mohawk*, 130 S.Ct. at 607 (identifying mandamus review as a possible remedy for a particularly injurious attorney-client privilege ruling). Mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes," *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (internal quotation marks omitted), and "only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy." *Id.* (internal quotation

marks and citations omitted). "Although we determine *de novo* whether the writ should issue, we must be firmly convinced that the district court has erred." [*Cohen v. U.S. Dist. Court*, 586 F.3d 703, 708 (9th Cir. 2009)].

"Whether a writ of mandamus should be granted is determined case-by-case, weighing the factors outlined in *Bauman v. United States Dist. Court*, 557 F.2d 650 (9th Cir. 1977)." *Cole v. U.S. Dist. Court*, 366 F.3d 813, 816-17 (9th Cir.2004). In *Bauman*, "we established five guidelines to determine whether mandamus is appropriate in a given case: (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneou as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression." *Perry*, 591 F.3d at 1156 (citing *Bauman*, 557 F.2d at 654-55). "The factors serve as guidelines, a point of departure for our analysis of the propriety of mandamus relief." *Id.* (citing *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir.1989)). "Not every factor need be present at once." *Id.* "In fact, rarely if ever will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable." [*Special Investments, Inc. v. Aero Air, Inc.*, 360 F.3d 989, 994 (9th Cir. 2004)].

Id. at *2.

Similarly, this Court has explained:

> Before a writ of mandamus may issue, a party must establish that (1) "no other adequate means [exist] to attain the relief he desires," (2) the party's "right to issuance of the writ is 'clear and indisputable,' " and (3) "the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 380-381, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (some internal quotation marks omitted). This Court will issue the writ of mandamus directly to a federal district court "only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Ex parte United States*, 287 U.S. 241, 248-249, 53 S.Ct. 129, 77 L.Ed. 283 (1932).

Hollingsworth v. Perry, __ U.S. __, 130 S.Ct. 705, 710 (2010).

Despite the Ninth Circuit's rejection of Petitioner's request for a writ of mandamus, the aforementioned factors weigh heavily in favor of such relief. First, with respect to the first two *Bauman* factors, like the Appellant/Petitioner in *Hernandez*, Petitioner has no other remedy available at law, such as a direct appeal. *Mohawk Industries, Inc.*, __ U.S. __, 130 S.Ct. 599, 609. Notwithstanding emergency mandamus relief, once the confidential communications are disclosed, the attorney-client privilege will be forever waived.

With respect to the remaining factors, as explained below, the district court's order is clearly erroneous and raises new and important problems and issues of first impression and public importance, and the lower courts misinterpreted federal law by concluding that Petitioner could not assert the attorney-client privilege on behalf of WeCorp and its officers and directors.

In concluding that Petitioner could not assert the attorney-client privilege on behalf of WeCorp, the district court magistrate relied on a number of non-controlling and/or unpublished district court opinions from other jurisdictions including *City of Rialto v. U.S. Department of Defense*, 492 F.Supp 2.d 1193 (C.D.Cal. 2007); *Gilliland v. Germita*, 2006 WL 2642525 (W.D.Pa. 206); *Lewis v. United States*, 2004 WL 3203121 (W.D.Tenn. 2004); *Lopez v. Vieira*, 2010 WL 430810 (E.D.Cal. 2010), explaining that those courts have held "that the attorney-client privilege expires upon the dissolution of a corporation or upon the corporation becoming defunct or going out of business." (Appendix at A-9). The magistrate explained that "those courts base their decisions on the United States Supreme Court's analysis of the privilege in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986 (1985)." (Appendix at A-10).

In *Weintraub*, this Court held that the trustee of a corporation in bankruptcy has the power to waive the attorney-client privilege with respect to pre-bankruptcy petition communications. *Weintraub* has been cited by a number of district courts, some of which have misinterpreted *Weintraub* to mean that a "defunct" corporation has no attorney-client privilege.

As an initial matter, none of the cases relied on by the district court, including *Weintraub*, are analogous to the situation here where the corporate Defendant's outside counsel previously retained to advise it regarding its compliance with federal and state criminal and securities laws was named as a "relief defendant" in the same action. In fact, the only justification for the continued inclusion of Petitioner in the underlying civil action as a "relief defendant" is the CFTC's misplaced claim that Petitioner is in possession of assets owned by WeCorp to which Petitioner allegedly has

no ownership interest.

As a matter of controlling law, and the only precedent relied on by the magistrate in his order, this Court's decision in *Weintraub* does not in any way support the magistrate's conclusion that WeCorp is a "defunct" corporation and Petitioner cannot assert its attorney-client privilege.

CFTC v. Weintraub

First of all, *Weintraub*, 471 U.S. 343, involved an investigation by the CFTC into whether Chicago Discount Commodity Brokers ("CDCB") or anyone involved with that firm violated the Commodity Exchange Act. In that case, the sole director and officer of CDCB entered into a consent decree with the Commission, which provided for the appointment of a receiver and for the receiver to file a petition for liquidation under Chapter 7 of the Bankruptcy Reform Act of 1978 (Bankruptcy Code). The district court appointed John K. Notz, Jr., as receiver.

Noltz thereafter filed a voluntary petition for bankruptcy on behalf of CDCB, and the CFTC served a subpoena duces tecum on CDCB's former counsel, Gary Weintraub. In response thereto, Weintraub asserted the attorney-client privilege. The receiver Noltz, however, expressly waived the privilege on behalf of CDCB. The CFTC thereafter moved to compel Weintraub to answer, and the Court ordered Weintraub to testify.

On appeal from that order, the Seventh Circuit held that "a bankruptcy trustee does not have the power to waive a corporate debtor's attorney-client privilege with respect to communications that occurred before the filing of the bankruptcy petition." *Id.* at 347. Thereafter, this Court granted certiorari and reversed the Seventh Circuit, holding that "the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege

with respect to prebankruptcy communications." *Id.* at 358.

In this case, unlike *Weintraub*, no receiver was appointed for WeCorp, no bankruptcy or dissolution proceedings were initiated, and no trustee or receiver was appointed who could waive WeCorp's attorney-client privilege. Thus *Weintraub*, the only controlling authority relied on by the magistrate, is completely inapplicable here and lends no support to the district court's orders. If anything, this Court in *Weintraub* recognized that the attorney-client privilege remains intact even for a "defunct" corporation in bankruptcy.

City of Rialto v. U.S. Department of Defense

Next, *Rialto*, 492 F.Supp 2.d 1193, which involved the question of whether, in light of *Weintraub*, a dissolved corporation has the right to assert the attorney-client privilege in subsequent litigation, is also completely distinguishable and inapplicable. *Rialto* involved allegations of water contamination by various companies over a period of many years.

Approximately 50 years earlier, Kwikset Locks, Inc. dissolved as a corporation and its assets were distributed to American Hardware Corporation and then to Emhart. Nevertheless, in 2005 Kwikset was served with a request for documents, to which Kwikset through its counsel asserted the attorney-client privilege. A special master was appointed to handle that discovery dispute, and ultimately concluded that the attorney-client privilege does not survive dissolution of a corporation, and that "when AHC and Emhart acquired Kwikset's assets and documents, the privilege passed to them as surviving corporations." *Railto*, 492 F.Supp at 1197. The special master further determined that Emhart had waived that privilege by failing to object within the time required by the Federal Rules of Civil

Procedure. *Id.*

The district court judge upon review of the special master's decision agreed with her factual and legal conclusion that a dissolved corporation cannot assert the attorney-client privilege, and further agreed that Kwikset's successor, Emhart, waived the right to assert that privilege by failing to object within the time required. *Id.* at 1202.

While it cannot be disputed that the district court in *Railto* held that a dissolved corporation could not assert the attorney-client privilege after dissolution, that decision lends no support whatsoever to the district court's orders in this case. Unlike *Railto*, in this case there was absolutely no admissible evidence whatsoever before the magistrate that WeCorp had been "dissolved" or that its assets and documents had been transferred to another successor entity. Unlike *Railto*, no other entity succeeded WeCorp, and therefore no successor could either assert or waive the privilege. Unlike both *Railto* and *Weintraub*, no other person or entity exists here who could assert or waive the privilege on behalf of WeCorp. Furthermore, Petitioner timely asserted the attorney-client privilege on behalf of WeCorp within the time required by the Federal Rules.

Gilliland v. Germita

Next, the unpublished *Gilliland* case, 2006 WL 2642525, cited by the magistrate involved several companies collectively known as "The Main Medical Companies" that had "ceased operations and a default judgment was entered against them. The Main Medical Companies, while insolvent and for all practical purposes out of business, [had] never been dissolved and [were] legal entities . . . in existence." *Id.* at *1. As explained by the district court:

[t]he former chief executive officer of the Main

> Medical Companies, Anthony Geramita, died since the filing of [the] lawsuit. . . . The two surviving members (i.e., owners) of Main Medical Holdings, LLC, Georgine DeMarino and Karen Bray, . . . indicated that to the extent of their authority, each [would] waive the attorney-client privilege.

Id.

The district court in *Gilliland* held that because "no person presently has the ability to either assert or waive the attorney-client privilege," *id.* at *3, counsel for The Main Medical Companies had no duty to assert the attorney-client privilege on their behalf. The district court explained that the "duty of counsel to assert the privilege would be triggered only when a person with authority to act on behalf of the corporation instructs counsel to assert the privilege." *Id.* at *4.

Unlike *Gilliland* where the Main Medical Companies president had died and its remaining members opted to waive the privilege, this record contains no such evidence of any waiver or unavailability. In fact, here WeCorp has five corporate officers including Stuart Jones, Payton Lowe, Nathan Ramos, Gary Duck, and Noah Luis. Although the CFTC claims that Jones and Lowe's whereabouts are unknown, Jones, who initially instructed Petitioner to protect the attorney-client privilege, has in fact maintained sporadic email and telephone contact with the undersigned regarding the status of his attorney-client privilege.

Additionally, Luis has maintained regular contact with Petitioner. And Duck has recently participated in a telephone conference with the district court on February 3, 2010. Finally, Lowe has communicated with counsel for Petitioner in the last month and has reaffirmed that WeCorp has

never given up its attorney-client privilege.

Therefore, unlike the situation in *Gilliland*, at least some of WeCorp's officers are "available."

Lopez v. Vieira

Finally, in *Lopez*, 2010 WL 430810, another unpublished opinion, the District Court for the Eastern District of California held that the attorney-client privilege was not available to a registered California corporation with no known assets and no known corporate headquarters, where the location of its corporate records and agent for service of process were unknown, where its management no longer functioned, where it carried out no ongoing business, and where it had no known activities of any kind. *Id.* at *16.

The magistrate here, relying on *Lopez*, determined that "[t]he evidence in this case, while not as conclusive as that in *Lopez v. Vieira*, also supports the conclusion that WeCorp, Inc. is essentially a defunct corporation." (Appendix at A-15). The magistrate's finding of "defunctness," however, was made without any admissible evidence being presented or tested before him or the district court and without even affording Petitioner or anyone an opportunity to rebut and/or cross-examine that supposed evidence, and was derived from a pyramid of untested and nonevidentiary inferences as follows:

1. "A default judgment has been entered against [WeCorp's defendant officers and directors] which, among other things, enjoins them from engaging in the commodities futures business."

2. "WeCorp's president and chief executive officer, Stuart Jones, stated at the hearing before the Court on September 8, 2009 that WeCorp has no assets, that it is not concealing any assets or operating under any other names and that it is out of

business."

3. "Relief Defendant Gary Duck, who was WeCorp's Director of Finance, also told the Court that he is not aware of any offshore accounts for WeCorp or its principals Jones and Payton Lowe. Mr. Duck also stated that he is not aware of any other assets of WeCorp, Jones or Lowe."

4. "WeCorp did not file its corporate information with the [State of Hawaii] in 2009."

5. "Mr. Dubin does not state in his declaration . . . that he has been instructed or requested by any officer or director of WeCorp to assert the attorney-client privilege on WeCorp's behalf."

6. "Mr. Arensmeyer does not state, however, that any of [WeCorp's Officers] have informed him or Mr. Dubin that WeCorp is still engaged in any type of business activity or is, in some other manner, carrying on an active corporate existence."

7. "Nor, of course, has any officer or director of WeCorp stepped forward to assert the attorney-client privilege on behalf of WeCorp in this action."

Although it is true that WeCorp and its officers defaulted in the district court case, and that WeCorp did not file its corporate information with the State of Hawaii in 2009, the remaining "findings" entered by the magistrate lack legal and evidentiary support. First of all, the waiver of WeCorp's attorney-client privilege is not one of the issues upon which WeCorp chose to default. That issue was never alleged in the CFTC's complaint, and WeCorp was never provided with any notice or opportunity to be heard on that unpled issue prior to defaulting. Because WeCorp and its officers defaulted in this case and judgments were entered against all defendants, there is absolutely no need whatsoever for further discovery since Petitioner, the only remaining party, is only named as a relief defendant, which obscure status as

a matter of law requires that there be no dispute regarding monies in his possession.

Second, although it is true that Defendant Stuart Jones stated at a hearing before the district court on September 8, 2009 "that WeCorp has no assets, that it is not concealing any assets or operating under any other names and that it is out of business," that statement was not made under oath, Mr. Jones was not subject to cross-examination, he was not subject to impeachment or rebuttal, nor was the magistrate present to evaluate Jones's demeanor and credibility when those statements were made. Nor did Jones, who was not represented by counsel, appear to intend in any way to waive the attorney-client privilege by making such a statement. Certainly, with the CFTC actively attempting to recover assets from WeCorp and its principals, Jones, a purported dishonest Ponzi Schemer, could have had any number of motives for denying that WeCorp had any assets. This record simply does not support the magistrate's finding that WeCorp has no assets.

To the contrary, the CFTC's only justification for its continued inclusion of Petitioner in the underlying district court case as a "relief defendant" is its misplaced claim that Petitioner is in possession of assets owned by WeCorp to which Petitioner has no ownership interest. Thus, the CFTC's own theory of this case and the district court's subject matter jurisdiction necessarily requires that WeCorp has assets. Otherwise, the district court must dismiss Petitioner from this case for lack of subject matter jurisdiction.[2]

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[2] Relief or "[n]ominal defendant status is a two-part, 'obscure common law concept.'" *Commodity Futures Trading Commission v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir. 2002). To be named as a relief defendant, "the creditor plaintiff must show that the nominal defendant has received ill gotten funds and that he does not have a legitimate

Furthermore, to the extent that the magistrate found that no officer of director of WeCorp has instructed Petitioner to assert the attorney-client privilege, that finding was made without that evidentiary question having even been presented by the parties to the magistrate for adjudication, it is not sustained by the evidence, and the parties certainly were not afforded an opportunity to address that issue before the magistrate hastily discarded the attorney-client privilege.

One of the most problematic aspects of the magistrate's rationale and "findings" is that WeCorp President Stuart Jones's initial instructions to Petitioner regarding his preservation of WeCorp's attorney-client privilege in this matter occurred in a privileged email correspondence, one of the very privileged documents the district court has ordered produced. As evidenced in a declaration filed by Petitioner in the district court case below, Jones specifically advised Petitioner in writing and on the telephone that he would not waive the attorney-client privilege.

Furthermore, as previously explained, Stuart Jones has in fact maintained sporadic email and

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claim to those funds." *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998).

The standard nominal or relief defendant in securities law "is a bank or trustee, which has only a custodial claim to the property." *Colello*, 139 F.3d at 677. Thus, a relief defendant is a person who "holds the subject matter of the litigation in a subordinate or possessory capacity as to which there is no dispute." *Id.* at 676 (quoting *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991)).

Furthermore, "as the nominal defendant has no legitimate claim to the disputed property, he is not a real party in interest. Accordingly, there is no claim against him and it is unnecessary to obtain subject matter jurisdiction." *Id.*

telephone contact with Petitioner and his counsel, expressly seeking advice regarding WeCorp's attorney-client privilege. For example, on September 17, 2009, Jones emailed Petitioner's district court attorney regarding the status of the attorney-client privilege, explaining that the CFTC was trying to convince him to waive his privilege, to which the CFTC itself can verify that Jones refused. Similarly, Payton Lowe, WeCorp's Vice President, has been in direct contact with Petitioner's district court counsel in the past month, and has reiterated that WeCorp has never "given up" its attorney-client privilege.

Despite its extensive efforts, the CFTC has been entirely unsuccessful in convincing any of WeCorp's officers, with whom it has had many contacts, to waive the attorney-client privilege. The facts of this record, if anything, demonstrate that WeCorp has refused to waive its attorney-client privilege, which was properly invoked for WeCorp by Petitioner with the full knowledge and direction of its officers and directors.

Thus, this case is akin to the published District Court case *Overton v. Todman & Co., CPAS, P.C.*, 249 F.R.D. 147 (S.D.N.Y. 2008). In *Overton*, the defendants sought privileged discovery materials from the attorneys and accountants of a "defunct" business, DBI. *Id.* at 148. The Court explained that "[t]hough [DBI] is still listed as an 'active' corporation on the New York State Department of State Website, . . . and has not been dissolved, . . . it is no longer in business[.]" Despite DBI's purported "defunct" status, because officers of DBI were still "available" to assert the privilege, the Court in *Overton* refused to order the attorney-client privilege breached. *Id.*

Here, as in *Overton*, even if WeCorp could be characterized as "defunct," WeCorp's officers have refused to waive the attorney-client privilege and

have directed Petitioner to preserve the privilege. Thus, WeCorp's attorney-client privilege continues to exist.

Finally, this Court should consider that WeCorp's directors and officers are almost certainly now facing probable indictment and criminal prosecution on the exact legal matters for which they sought Petitioner's legal assistance in the first place. In circumstances such as these, the attorney-client privilege effectively incorporates and safeguards a client's Fifth Amendment right against self-incrimination. *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569 (1976); *see also*, *Foster v. Hill*, 188 F.3d 1259, 1271 (10th Cir. 1999).

Not only would court-ordered disclosure of privileged documents interfere with any likely criminal investigation leading to potential "fruit of the poisonous tree," and other such problems, but disregarding the attorney-client privilege under these circumstances would abridge fundamental constitutional rights, including the Fifth Amendment right against self-incrimination, and the right to counsel in criminal prosecution guaranteed under the Sixth Amendment. Those rights are clearly safeguarded by this ancient fundamental privilege. As this Court explained in *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619 (1989):

> We have recognized the attorney-client privilege under federal law, as "the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981). Although the underlying rationale for the privilege has changed over time, *see* 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961), courts long have viewed its central concern as one "to encourage full and frank

> communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn*, 449 U.S., at 389, 101 S.Ct., at 682. That purpose, of course, requires that clients be free to "make full disclosure to their attorneys" of past wrongdoings, *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976), in order that the client may obtain "the aid of persons having knowledge of the law and skilled in its practice," *Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 127, 32 L.Ed. 488 (1888).

Zolin, 491 U.S. at 562 (footnote omitted).

This Court's intervention is needed not only to clarify the application of *Weintraub* by the lower courts to defeat the attorney-client privilege, but is urgently needed to determine the professional, ethical, and constitutional propriety of the lower courts' orders invading the attorney-client privilege. Such intervention is of exceptional importance to the broader public interests in the observance of law and administration of justice, especially in light of this Court's recent opinion in *Mohawk*.

Mohawk announced a general rule that it is submitted was too broad in scope, addressing the facts of that specific case, but not taking into account the myriad of other factual circumstances wherein the *Mohawk* rule would be inapplicable or unjust and contrary to constitutional standards and values, especially in cases like this where fundamental constitutional rights traditionally safeguarded by the attorney-client privileged are subject to immediate irreparable harm as the result of district court-ordered disclosure.

Here, a factual situation completely different from that in *Mohawk* proves why *Mohawk* and the

exceptions thereto need to be clarified in order for this Court to provide guidance to the lower federal courts. What is at stake is not the attorney-client privilege generally, otherwise blocking a search for the truth in ordinary civil litigation with no criminal implications, but the necessity to preserve Fifth and Sixth Amendment constitutional rights of defendants being targeted by federal and state criminal justice systems. Unlike the facts in *Mohawk*, the underlying policy considerations here supporting the preservation of the attorney-client privilege necessarily safeguard the implicated right against self-incrimination and the right to effective assistance of counsel.

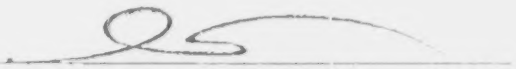
Because the traditional appellate process for review of disclosure orders adverse to the attorney-client privilege was abolished by *Mohawk*, district courts at first glance appear unrestrained in their decisions without the possibility of appellate reversal. In the absence of proper judicial oversight, the attorney-client privilege would be rendered essentially meaningless, as would those fundamental constitutional rights the privilege protects.

Mandamus review is essential herein, not only to the fundamental constitutional rights implicated in this case, but to the continued viability of the attorney-client privilege in our federal courts. This Petition presents this Court with an exceptional opportunity to instruct both the district courts and the courts of appeal with respect to their applications of the attorney-client privilege, post-*Mohawk*, and in particular, to clarify the level of irreparable harm necessary to justify review.

CONCLUSION

For all of the foregoing reasons, the Petition should be granted.

Respectfully submitted,



GARY VICTOR DUBIN
Petitioner/Counsel of Record

FREDERICK J. ARENSMEYER
Attorneys for Petitioner

Honolulu, Hawaii
June 4, 2010

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A. United States Court of Appeals for the Ninth Circuit -- Order Denying Petition for Writ of Mandamus

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: GARY VICTOR DUBIN	No. 10-71739
GARY VICTOR DUBIN, Petitioner, v. UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII Respondent, UNITED STATES COMMODITY FUTURES TRADING COMMISION; et al., Real Parties in Interest	D.C. No. 1:09-cv-00153-PMP District of Hawaii, Honolulu ORDER

Before : KOZINSKI, Chief Judge, LEAVY and N.R. SMITH, Circuit Judges.

Petitioner has not demonstrated that this case warrants the interventions of this court by means of the extraordinary remedy of mandamus. *See Bauman v. United States Dist. Court,* 557 F.2d 650 (9th Cir. 1977). Accordingly, the petition is denied.

B. United States District Court for the District of Hawaii -- Minutes of Telephonic Status Hearing of May 17, 2010

UNITED STATES DISTRICT COURT

DISTRICT COURT OF HAWAII

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Plaintiff (s); vs. WECORP, INC., et al., Defendant(s)	1:09-CV- 153- PMP MINUTES OF THE COURT DATED: May 17, 2010

PRESENT: THE HONORABLE PHILIP M. PRO,

UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: Donna Andrews

REPORTER: Summer Rivera

COUNSEL FOR PLAINTIFF (S): Jennifer J. Chapin, Jeff Le Riche, JoMettenburg

COUNSEL FOR DEFENDANT(S): Frederick J. Arensmeyer

PROCEEDINGS: **TELEPHONIC STATUS HEARING**

1:10 P.M. Court convenes.

The Court hears the arguments of counsel on objections to Magistrate Foley's Order (165) entered on 3/29/2009.

The Court affirms Magistrate Foley's Order (165) and overrules the objections (168) to that Order.

IT IS ORDERED the documents that are the subject of assertion of privilege claim are to be produced for Plaintiff by 6/7/2010. All discovery shall be completed by 7/7/2010. Dispositive motions shall be filed by 8/9/2010. The Joint Pretrial Order shall be filed by 9/9/2010.

1:30 p.m. Court adjourns.

SUE BEITIA, CLERK

By: /S/

Donna Andrews, Deputy Clerk

C. United States District Court for the District of Hawaii -- Order on Motion for an Order Compelling Relief Defendant Gary V. Dubin to Produce Unredacted Documents

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

UNITED STATES COMMODITY FUTURES TRADING COMMISSION, Plaintiff, vs. WECORP, INC., *et al.*, Defendants, GARY V. DUBIN, GARY DUCK; and NATHAN P. RAMOS, Relief Defendants.	Case No. 2:09-cv-00153-PMP **ORDER** **Motion for an Order Compelling Relief Defendant Gary V. Dubin to Produce Unredacted Documents-# 147**

Pursuant to an order by United States District Judge Philip M. Pro, Plaintiff's Motion for an Order Compelling Relief Defendant Gary V. Dubin to Produce Unredacted Documents (#147), filed on February 17, 2010, has been referred to the undersigned Magistrate Judge for decision. Relief Defendant Gary V. Dubin's Opposition to "Plaintiff's Motion for an Order Compelling Relief

Defendant Gary V. Dubin to Produce Unredacted Documents" (#155) was filed on March 5, 2010. The Plaintiff did not file a reply to the opposition. The Court concludes that this motion can be resolved without oral argument.

BACKGROUND

On April 7, 2009, the Plaintiff United States Commodity Futures Trading Commission ("CTFC") filed a complaint for Permanent Injunction, Civil Monetary Penalties and Other Equitable Relief (#1) against Defendants WeCorp, Inc., a Hawaii Company, and its principal officers Stuart Jones and Payton Lowe. The complaint also named Gary V. Dubin, Gary Duck, and Nathan P. Ramos as Relief Defendants. The complaint alleges that WeCorp, through Jones and Lowe, operated a Ponzi scheme which solicited approximately $1.5 million from members of the general public for the purported purpose of investing in an off-exchange foreign currency contracts ("forex"). *Complaint (#1)* ¶ 1. Plaintiff alleges that Defendants made various misinterpretations to induce these investments. Instead of using all of the funds to invest in forex, Defendants used part of the funds to pay back early WeCorp investors and to "fund Defendants' luxurious lifestyles in the Hawaiian Islands and pay for Jones's, Lowe's and others' personal expenses." *Id,.,*¶2. The complaint alleged that Relief Defendants Dubin, Ramos, and Duck received ill-gotten gains from Defendants' fraudulent conduct. It alleges that the Relief Defendants provided no legitimate services to WeCorp and otherwise had no legitimate entitlement to investor funds. The complaint seeks a judgment requiring these relief defendants to disgorge all ill-gotten gains regardless of whether they violated the law. *Complaint (#1)* ¶¶6, 33, 38.

Defendants WeCorp, Jones and Lowe, and Relief Defendants Ramos and Duck did not answer the

complaint. The court granted the CFTC's application for entry of default against these defendants and relief defendants on July 14, 2009. *See Minutes of the Court (#58).* On September 11, 2009, the Court entered a default judgment against Defendants WeCorp, Jones and Lowe in which it granted a permanent injunction, restitution and imposed civil monetary penalties against the Defendants. The Court further ordered that the defaulting Relief Defendants Ramos and Duck disgorge funds they received from WeCorp. *Order for Entry of Default Judgment (#96).*

On September 8, 2009, the Court conducted a telephone hearing in regard to the CFTC's motion for an order to show cause why Defendant Jones and Relief Defendant Duck should not be held in contempt for violation of the restraining order and preliminary injunction by telling WeCorp's investors that, among other things, it had money or assets concealed in offshore bank accounts. Defendant Jones and Relief Defendant Duck were present during the hearing and the Court questioned them about their statements to investors. The Court found that Duck was not aware of any offshore accounts or other assets of WeCorp or its principals, Jones and Lowe. Defendant Jones denied that WeCorp had any assets or money concealed, or that it had any offshore bank accounts or other assets maintained outside of the continental United States. Defendant Jones also affirmatively stated that WeCorp has no assets. He also denied that WeCorp, himself, or others using different names, have any offshore investment corporations that are currently trading stocks, bonds, or forex. Finally Defendant Jones affirmatively stated that "WeCorp is out of business." *Order (#106),* filed September 29, 2009.

Relief Defendant Gary V. Dubin was WeCorp's legal counsel. Although the CFTC alleges that Dubin provided

no legitimate services to WeCorp, Mr. Dubin states in his declaration that his law firm was retained by WeCorp as outside counsel in November 2008 to conduct an independent legal audit of WeCorp's affairs based on a negotiated fixed-fee contract. Mr. Dubin states that on November 14, 2008, his legal team met with WeCorp's personnel, listened to their explanations about the company's operations and goals, and received copies of their program, trading and financial documentation. Mr. Dubin states that he thereafter maintained close, almost daily contact with WeCorp's various directors and that he and others in his law firm advised them on a number of matters including compliance with federal law. Mr. Dubin asserts that these communications are protected by the attorney-client privilege. *Opposition (#155), Exhibit "A", Dubin Declaration, ¶¶5, 8-9.* Mr. Dubin also states that in mid-February 2009, his own investment company Dubin Financial, LLC invested $200,000 with WeCorp.

In response to Plaintiff's requests for production of documents, Relief Defendant Dubin asserted the attorney-client privilege on behalf of WeCorp in regard to various documents or portions of documents which were redacted from his production. Plaintiff requests that the Court order Relief Defendant Dubin to produce all the requested documents in unredacted form because he has no valid basis upon which to assert the attorney-client privilege on WeCorp's behalf. Alternatively, Plaintiff requests that the Court conduct an *in camera* review of the allegedly privileged documents and determine whether the privilege is properly asserted.

DISCUSSION

The attorney-client privilege protects confidential disclosures made by a client to an attorney in order to obtain legal advice, as well as an attorney's advice in response to such disclosures. *In re Grand Jury*

Investigation, 974 F.2d 1068, 1070 (9th Cir. 1992). Because it impedes the full and free discovery of the truth, the attorney-client privilege is strictly construed. *Weil v. Investment/Indicators, Research and Management, Inc.,* 647 F.2d, 18, 24 (9th Cir.1981); *United States vs. Ruehle,* 583 F.3d 600, 607 (9th Cir. 2009) This does not mean, however that the privilege is disfavored. Within its confines, the privilege serves an important purpose of encouraging full and frank communication between the attorney and the client and thereby promotes broader public interests in the observance of law and administrations of justice. *In re Teleglobe Communications Corporation,* 493 F.3d 345,360,361 n. 13 (3rd Cir. 2007), citing *Upjohn Co. v. United States,* 449 U.S. 383, 389, 101 S.Ct. 677, 682 (1981). The burden is on the party asserting the attorney-client privilege to show that it applies to a given set of documents or communications. *United States v. Blackman,* 72 F.3d 1418, 1423 (9th Circ. 1995). The party must demonstrate that the documents adhere to the essential elements of the attorney-client privilege, which the court has defined as follows: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protections be waived. *In re Grand Jury Investigation,* 974 F.2d at 1071 n. 2.

The attorney-client privileges can be asserted by a corporation. *Upjohn Co. v. United States,* 449 U.S. 383, 390, 101 S.Ct. 677, 683 (1981), citing *United States v. Louisville & Nashville R. Co., 236* U.S. 318, 336, 35 S. Ct. 363, 369 (1915). Several federal district decisions have held, however, that the attorney-client privilege expires upon the dissolution of a corporation or upon the corporation becoming defunct or going out of business. *City of Rialto v. U.S. Department of Defense,* 4932, F.

Supp 2.d 1 193 (C.D. Cal. 2007); *Gilliland v. Geramit*, 2006 WL 2642525 (W.D. Pa. 2006); *Lewis v. United States*, 2004 WL 3203121 (W.D. Tenn. 2004); and *Lopes v. Vieira*, 2010 WL 430810 (E.D. Cal. 2010). These courts base their decisions on the United States Supreme Court's analysis of the privilege in *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986 (1985).

In *Weintraub*, the CFTC filed an action for securities fraud against a discount brokerage house. That same day, the sole director and officer of the company entered into a consent decree with the CFTC which provided for the appointment of a receiver for the company and for the receiver to file a petition for liquidation under Chapter 7 of the bankruptcy code. After the bankruptcy was filed, the CFTC served a subpoena on the company's former counsel to question him about various company matters, including suspected misappropriation of customers funds by the company's officers and employees. The attorney refused to answer several questions based on the attorney-client privilege. The CFTC thereafter obtained a statement from the bankruptcy trustee waiving the company's attorney-client privilege *vis' a vis* the information sought from the company's former attorney. The attorney still refused to answer. In addition, the company's present and former officers argued that the trustee could not waive the privilege as to communications that occurred before the company was placed in bankruptcy. The Supreme Court held that the trustee in bankruptcy, rather than the officers of the debtor corporation, had the right to exercise or waive the attorney client privilege on behalf of debtor corporation even as to confidential communications that occurred prior to the filing for bankruptcy. The Court held that the attorney-client privilege can only be asserted by the current management of the corporation, and that it is the bankruptcy trustee who fills the role of manager of the

debtor corporation's affairs, rather than corporate directors and officers who are no longer in control of the corporation.

In *City of Rialto v. U.S. Department of Defense,* the court relied on *Weintraub* in holding that the attorney-client privilege cannot be asserted on behalf of a legally dissolved corporation.
The court stated as follows:

> *Weintraub*...does not directly address the question presented by the current motion, i.e., whether a dissolved corporation has the right to assert the attorney-client privilege in subsequent litigation. *Weintraub* did find, however, that the analysis and rationale for asserting the privilege as a corporation is entirely different from the analysis and rationale that applies to individuals:
>
> > [A] corporation , as an inanimate entity, must act through agents... When the corporation is solvent, the agent that controls the corporate attorney-client privilege is the corporation's management. Under our holding today, this power passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege.
>
> *Weintraub*, 471 U.S. at 356, 105 S.Ct. 1986 (citations omitted).

> *Weintraub's* discussions regarding the distinctions between corporations and individuals particularly meaningful here because many of Emhart's arguments for allowing a dissolved corporation to assert the privilege are more compelling when one considers an individual's interest in the privilege, rather than a corporation's. Moreover, it is this distinction that several authorities have relied upon in reaching the conclusion that a dissolved corporation must not be permitted to assert the attorney-client privilege after dissolution.

City of Rialto, 492, F.Supp.2d at 199.

The *Rialto* court relied on *Gilliland v. Geramita*, 2006 WL 2642525 (W.D. Pa. 2006) in stating that there should be a presumption that the attorney-client privilege is no longer viable after a corporate entity ceases to function, unless a party seeking to establish the privilege demonstrates authority and a good cause. The court stated that this rule is consistent with the principle that the attorney-client privilege should be given the narrowest interpretation consistent with its purpose. *Rialto*, 492 F. Supp.2d at 1200.

Gilliland also involved an underlying lawsuit for securities fraud. The defendants were two corporations and a limited liability company ("LLC") which had not been dissolved as a legal entities. The companies had ceased operations, however, and a default judgment had been entered against them. The court further noted that they were insolvent and for all practical purposes were out of business. The plaintiff sought to compel the companies' former legal counsel, who had also previously served as a manger of the LLC and a director of the corporations, to produce company documents. The chief executive officer or the companies was deceased and all other officers and directors apparently resigned. The

court first noted that the burden is on the person asserting the privilege to show that it applies. Relying on *Weintraub's* analysis that the attorney-client privilege is controlled by the corporation's current management, the court found that there was no person in a role analogous to current corporate management who could assert the privilege on the defendant's behalf. *Gilliland* ,2006 WL 2642525 at *3. Accordingly, the defendants could not meet their burden to prove that the privilege had been validly asserted.

Lopes v. Vieira involved a limited liability company, Valley Gold, LLC, that was technically still in "good standing' under California corporation law. In holding that there was no current management personnel who could assert the privilege on the company's behalf, however the court stated:

> Valley Gold's annual meetings have not been held, no manager has been re-elected at an annual meeting, and no managers remain under the terms of the Operating Agreement. Joe Machado cannot continue to be Valley Gold's president/chairman since he served at the pleasure of a management committee that no longer exists (Operating Agreement, § 5.6 (a). Doc. 137 at 11). That Section 5.6 of the Operating Agreement grants Valley Gold's president the power to generally and actively manage Valley Gold's business, as Downey Brand contends, is meaningless as Joe Machado no longer validly holds the office of president/chairman and Valley Gold no longer conducts any business. Nonetheless, until Valley Gold has been dissolved in compliance with California law, it continues to exist as a corporate entity.
>
> Under the reasoning of *Gilliland* , because Valley Gold has no corporate manager or officer to

> assert or waive the attorney-client privilege, it follows that Valley Gold does not retain the attorney-client privilege in this action. As in *Gilliland* and *Weintraub*, the Valley Gold's ability to invoke or waive attorney-client privilege does not exist in the fiction of its corporate survival, as an inactive corporation that has not complied with California corporations law regarding its required corporate information.

Lopes v. Vieira, 2010 WL 430810 at *14-*15.

Consistent with *Weintraub's* analysis, *Lopes* also held that policies underlying the attorney-client privilege did not favor recognizing the company's right to assert the privilege:

> Valley Gold retains no known assets. It has no known corporate headquarters. The location of its corporate records and agent for service of process are unknown. Its management no longer functions; it carries out no ongoing business; and it has no activities of any kind. It has not amended its California corporate registration to reflect a current address, managers, or agent for service or process. Valley Gold no longer pursues its corporate purpose of manufacturing and marketing cheese. Its shareholders long ago concluded that their investments were lost and that their outstanding invoices would not be paid. Losses associated with investing in Valley Gold and selling it milk forced several investor-dairymen out of business and spawned multiple lawsuits. Valley Gold has little to gain and more importantly, nothing to protect if Downey Brand successfully invokes attorney-client privilege on its behalf.

> On the other hand, Plaintiffs allegations and the public record support the interference that Valley Gold's incorporators disregarded their fiduciary duty to corporate investors. As in *Weintraub*, Downey Brand's invocation of Valley Gold's attorney-client privilege threatens Plaintiff's ability to uncover evidence of fraud or misappropriation of corporate assets by Valley Gold, its agents, or its management, as well as Downey's Brand's own alleged participation in those bad acts. Whether in the interests of perpetuating further fraud or simply to promote a new business venture, Vieira acted to promote his own interests at Valley Gold shareholders' expense, failing to disclose fully the nature of his role in the Suprema round tripping scam and the status of the criminal case against him. If Vieira breached his fiduciary duty to Valley Gold and its shareholders, he was in a conflict position, the attorney-client privilege does not apply to his communications to Downey Brand as Valley Gold's agent in the course of Valley Gold's incorporation.

*Id., at *16.*

The evidence in this case, although not as conclusive as that in *Lopes v. Vieira*, also supports the conclusions that WeCorp, Inc. is essentially a defunct corporation. Neither WeCorp nor the defendant officers and directors answered the complaint. A default judgment has been entered against each of them which, among other things, enjoins them from engaging in the commodities futures business. WeCorp's president and chief executive officer, Stuart Jones, stated at the hearing before the Court on September 8, 2009 that WeCorp has no assets, that is not concealing any assets or operating under any other names and that it is out of business. Relief Defendant

Gary Duck, who was WeCorp's Director of Finance, also told the Court that he is not aware of any offshore accounts for WeCorp of its principals Jones and Payton Lowe. Mr. Duck also stated that he is not aware of any other assets of WeCorp, Jones or Lowe. *Order (#106)*.

Relief Defendant Dubin attached to his opposition a copy of WeCorp's corporate information and lists of officers on files with the State of Hawaii. *Opposition (#155), Exhibit "E"*. That document shows that WeCorp was incorporated in December 2007 and that it made its annual filing on November 18, 2008. The document lists the corporation's officers and directors as of October 1, 2008. The document also shows, however, that WeCorp did not file its corporate information with the state in 2009. This is consistent with Mr. Jones' statement on September 8, 2009 that WeCorp is out of business.

Mr. Dubin does not state in his declaration, *Opposition (#155), Exhibit "A"*, that he has been instructed or requested by any officer or director of WeCorp to assert the attorney-client privilege on WeCorp's behalf. Nor has Mr. Dubin produced any evidence, contrary to Mr. Jones's statement on September 8. 2009, that WeCorp is still in business or exists as an *active* legal entity. Mr. Dubin's counsel, Mr. Arensmeyer, states that he has maintained sporadic email and telephone contact with Defendant Stuart Jones. Mr. Arensmeyer states that Noah Luis, who is listed as a director of WeCorp in its November 2008 filing, has maintained regular contact with both Dubin and Mr. Arensmeyer. Mr. Arensmeyer also states that Relief Defendant Gary Duck recently participated in a telephone conference with the Court on February 3, 2010. *Opposition (#155)*, p. 14. Mr. Arensmeyer does not state, however, that any of these individuals have informed him or Mr. Dubin that WeCorp is still engaged in any type of business activity or is, in some other manner, carrying on

an active corporate existence. Nor, of course, has any officer or director of WeCorp come forward to assert the attorney-client privilege on behalf of WeCorp in this action. Relief Defendant Dubin, therefore, cannot meet his burden to show a lawful and valid basis for asserting the attorney-client privilege on behalf of WeCorp.

Because the Court concludes that the attorney-client privilege can no longer be asserted on behalf of the WeCorp, Inc., it is unnecessary for the court to conduct *in camera* review of the withheld documents. The Court, nevertheless, briefly addresses Mr. Dubin's argument that *in camera* review is not proper. Mr. Dubin bases his argument on the assertion that the CFTC has not made a sufficient preliminary showing that the crime-fraud exception to attorney-client privilege applies. He relies on *United States v. Zolin*, 491 U.S. 554, 444, (1989). *See Opposition (#155)*, pp 8-13. The CFTC, however, has not asserted that the crime-fraud exception applies. Rather, the CFTC bases its request for *in camera* review on the assertion that some of the documents withheld by Mr. Dubin may involve non-privileged communications relating to the business dealings between Mr. Dubin and WeCorp. As noted above, in addition to serving as WeCorp's legal counsel, Mr. Dubin's company was also an investor in WeCorp. The CFTC also argues that the privilege may have been waived in regard to some documents by virtue of Mr. Dubin's inconsistent redactions.

In re Grand Jury Investigation, 974. F.2d 1068, 1074 (9th Cir. 1992), stats that *in camera* review is an acceptable means to determine whether disputed materials fit within the attorney-client privilege. In order to trigger *in camera* review, the party opposing the privilege need only show a factual basis sufficient to support a reasonable good faith belief that *in camera* inspection may reveal evidence that information in the

materials is not privileged. If the party makes such a showing, then the decision whether to conduct the review rests within the discretion of the district court. *Id.*, at 1075. In this case, the CFTC has demonstrated a sufficient factual basis to trigger *in camera* review based on the contention that some of the withheld documents contain non-privileged business communications, or because some of the withheld documents have already been produced. Although sufficient grounds exit to justify *in camera* review, the Court concludes that Mr. Dubin cannot assert the attorney-client privilege on behalf of WeCorp because it is no longer in business and is a defunct corporation, notwithstanding its arguable continuing legal existence. Therefore, the CFTC is entitled to obtain production of the requested documents in their entirety. Accordingly,

IT IS HEREBY ORDERED that Plaintiff's Motion for an Order Compelling Relief Defendant Gary V. Dubin to Produce Unredacted Documents (#147) is **granted** and Relief Defendant Gary V. Dubin is hereby ordered to produce all documents to Plaintiff hat he has withheld on the basis of the attorney-client privilege, including the redacted portions of such documents. Relief Defendant Dubin is further ordered to produce such documents within fourteen (14) days from the filing of this order.

DATED this 26th day of March, 2010

/S/
GEORGE FOLEY, Jr.
United States Magistrate Judge